SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR.

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973

NO. 73-1812

HAROLD WILLIS and
CHRISTINE MATTHEWS,
Petitioners,

vs.

THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the Court of Appeal,
State of California,
First Appellate District,
Division Two

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The petition of Harold Willis and Christine Matthews respectfully shows that:

(a) The opinion of the Court of Appeal herein is unpublished. The opinion is reproduced under subdivision (i) infra. For convenience, the opinion in People v. Metzger, 22 Cal. App. 3d 338, 99 Cal. Rptr. 264 (1971) is also reproduced under subdivision (i) infra.

(b) (i) The opinion of the Court of Appeal herein was filed on January 16, 1974. Petitioners timely petitioned for a hearing in the Supreme Court of California, and the Supreme Court of California denied a hearing on March 13, 1974.

(ii) Not applicable.

(iii) Jurisdiction is conferred upon this Honorable Court to review the judgment below by writ of certiorari by 28 U.S.C. § 1257(3).

(c) Does the Fourth Amendment per-

mit police to enter a home searching for evidence, where their purpose is to defeat the expectation of privacy of a household, and they use active misrepresentation appealing to an innocent motive of a householder?

(d) AMENDMENT IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CALIFORNIA PENAL CODE § 1538.5. Motion to return property or suppress evidence

(a) Grounds. A defendant may move for the return of property or to

suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on the ground that:

(1) The search or seizure without a warrant was unreasonable; or

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

* * *

(d) Effect of granting motion. If a search or seizure motion is granted

pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the people.

* * *

(f) Felony; motion at preliminary hearing. If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

* * *

(i) Felony; renewal of motion at special hearing; review. If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to

answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after

the denial of his motion at the special hearing.

* * *

(m) Exclusive pre-trial remedy; review on appeal after conviction. The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction

is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

(e) During the second or third week of April, 1971, police arranged with Mike Bardeleben, who had narcotics charges pending against him, to enter 558 Steiner Street, San Francisco, twice. He was supposed to introduce Wolfe to the occupants to buy drugs, but was unsuccessful. (Reporter's Transcript, hereinafter "R.T.", p. 11, line 14 - p. 13, line 9; p. 14, lines 14-20; p. 17, lines 26-28; p. 19, lines 8-18; p. 20, lines 2-25.)

Thereafter, an officer went to 558 Steiner and a male answered. The

officer said that he was looking for Mike Bardeleben to buy a handmade belt. The male said that no one there made leather goods and sent Wolfe away. (R.T. p. 23, line 20 - p. 24, line 13.)

On July 1, 1971, two officers went to 558 Steiner. Petitioner Christine Matthews answered the bell. (Preliminary Hearing Transcript, hereinafter "P.H.", p. 5, line 27 - p. 6, line 9; p. 11, line 18 - p. 12, line 2; p. 19, lines 17-28.)

The officer stated that he was looking for "Mike." Miss Matthews said that she did not know the person, but that there were several people upstairs playing poker, and she admitted them so they could see if he was there. (P.H. p. 6, lines 11-21; p. 12, lines 7-24; p. 13, lines 8-10.)

Inside the premises, the officers saw contraband in the kitchen where the poker game was in progress and in an open door down the hall. (P.H. p. 6, lines 22-26; p. 8, line 19 - p. 9, line 22; p. 13, line 22 - p. 15, line 1; p. 15, lines 22-27; p. 16, lines 3-6; p. 16, lines 11-22; p. 25, line 14 - p. 26, line 4.)

The police told Miss Matthews that the person they were looking for was not there, and left. (P.H. p. 10, lines 7-11; p. 33, line 15 - p. 34, line 8; p. 38, line 17 - p. 39, line 18.)

Then the officers went down the street where three other officers were waiting. All five officers returned to 558 Steiner and the premises were secured pending the issuance and execution of a search warrant. (P.H.

p. 10, lines 12-18; p. 17, line 21 - p. 19, line 11; p. 38, lines 3-16; p. 39, lines 24-26; p. 40, lines 22-26; p. 41, line 17 - p. 43, line 3; p. 43, lines 22-28; p. 44, lines 6-17; p. 49, lines 11-28; p. 51, line 28 - p. 52, line 15; p. 52, lines 20-28; p. 53, line 1 - p. 54, line 17; p. 60, line 23 - p. 63, line 8; p. 67, line 23 - p. 68, line 13; p. 72, lines 2-4; p. 72, line 20 - p. 73, line 12; p. 73, line 22 - p. 74, line 1.)

All parties agreed that were the initial entry unlawful, the search warrant must fall. (R.T. p. 3, line 19 - p. 4, line 11; p. 7, lines 17-20.)

At the commencement of the motion to suppress in Superior Court, the court stated that if the police were not really looking for Mike Bardeleben, any consent to the entry would be viti-

ated by the deception. (R.T. p. 6, lines 8-16.) This view was in accord with the then prevailing California authorities which are cited under (h) infra.

Throughout the proceedings below, the police insisted that they really were looking for Mike Bardeleben on July 1. Mike Bardeleben has reddish hair and no beard. The police described a bearded individual to Miss Matthews when she opened the door and did not mention the reddish hair. The officer involved had had considerable opportunity to observe Mike Bardeleben before July 1. Further, the police had no reason to believe that Mike Bardeleben would be at 558 Steiner after the April entry which they arranged. (R.T. p. 13, lines 10-21; p. 14, lines 14-20; p. 15, lines 7-16; p. 18, lines 5-9;

p. 18, lines 10-13; p. 18, lines 14-20; p. 18, line 21 - p. 19, line 2; p. 21, lines 8-24; p. 22, lines 5-11; p. 22, lines 17-27; p. 23, lines 5-11; p. 24, line 24 - p. 25, line 4; p. 25, line 11 - p. 26, line 23; p. 27, lines 15-17; p. 27, lines 18-19; p. 28, lines 2-9.

The court concluded that there was no reasonable likelihood that Mike Bardeleben would be on the premises, and that a deception had been practiced. (Reporter's Transcript Augmentation, January 7, 1972, hereinafter "R.T.A.", p. 2, line 11 - p. 3, line 15; p. 4, lines 19-26; p. 6, lines 11-16.)

In ruling on the motion, the court observed, "We first started out on the theory that if there was a deception, that ended it." (R.T.A. p. 1, lines 20-22.)

However, between the testimony at the suppression hearing in Superior Court and the ruling on the motion to suppress, the Court of Appeal, First District, Division One, decided People v. Metzger, supra. The court found the Metzger case "very persuasive" (R.T.A. p. 1, lines 5-19) and, on the strength of Metzger, held that despite the deception the entry was lawful.

The Court of Appeal in the instant case held that " ... the officers in this case used a type of 'deception' as to their true motive in seeking admittance to the premises .... " (Opinion, p. 1.) However, the Court of Appeal held that since Miss Matthews admitted strangers who were purportedly looking for someone who was also a stranger to her, she exhibited no reasonable expectation of

(f) Pursuant to California Penal Code § 1538.5(a), (d), and (f), petitioners attacked the constitutionality of the search and seizure via a motion to suppress at the preliminary hearing on August 13, 1971. Pursuant to § 1538.5(i), petitioners relitigated de novo the constitutionality of the search and seizure at a special hearing in Superior Court. Although both petitioners pleaded guilty to one count of the information, petitioners appealed from the judgment on the basis that the search and seizure was unconstitutional, which appeal is provided for in § 1538.5(m). Petitioners sought a hearing in the California Supreme Court, urging the unconstitutionality of the search and seizure.

(g) Not applicable.

(h) Prior to People v. Metzger,

supra, California law was clear that police deception to obtain consent to an entry vitiated the consent and that the entry and the use of any evidence obtained thereby was prohibited by the Fourth Amendment. Please see, e.g., People v. Reeves, 61 Cal. 2d 268 (1964); People v. Mesaris, 14 Cal. App. 3d 71 (1970); In re Robert T., 8 Cal. App. 3d 990 (1970); People v. Miller, 248 Cal. App. 2d 731 (1967); People v. Porter, 227 Cal. App. 2d 211 (1964); People v. Hodson, 225 Cal. App. 2d 554 (1964).

This was turned upside down by People v. Metzger, supra. In Metzger, a police agent, who was acquainted with Metzger, obtained entry to Metzger's house by falsely representing himself to be a potential client of Metzger. The Court of Appeal in Metzger held

that Metzger was controlled by United States v. White, 401 U.S. 745, 91 S. Ct. 1122, 28 L.Ed. 2d 453 (April 5, 1971), because in each: "(1) a willing informer (2) personally known to [defendant] (3) was invited into [defendant's] home (4) by means of deception as to his motive (5) for the purpose of reporting criminal activity to Government agents (6) and but for the questioned entry no constitutional violation occurred." And, moreover, the Fourth Amendment does not protect " ... a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it ..." (p. 343).

Petitioners do not contend that one has a constitutional right, or any right, to rely upon a misplaced belief that a person to whom one voluntarily

confides his wrongdoing will not reveal it. We do strenuously contend that the entry of the police officers here and the entry of McDonald in Metzger are illegal and that the observations and search warrants which ensued are fruit of the poisonous tree.

In White, the issue was whether agents who electronically monitored conversations between White and an informant with a concealed transmitter could testify to those conversations. The plurality concluded, at U.S. 751: "If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the

agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks." And, at U.S. 753: " ... [W]e are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony, nevertheless has a Fourth Amendment privilege against a more accurate version of the evidence in question."

There were six conversations in White, only one of which occurred in White's home. White never attacked the entry, and none of the five opinions filed by the Supreme Court even mentions how the entry was effected. Thus, White is not an entry case at all.

The Court of Appeal in Metzger also relied upon Hoffa v. United States, 385 U.S. 293 (1966) and Lewis v. United States, 385 U.S. 206 (1966). Three

fundamental considerations indicate that the result should be different in the instant case from the result in Hoffa and Lewis.

First, from the standpoint of the police: In the instant case, and in Metzger, it is clear that the purpose of the police in using the deception was to obtain entry into a home in hopes of making sufficient observations to obtain a search warrant.

The Government argued in Hoffa that (1) the incriminating statements overheard by Partin could have been made anywhere and showed no logical relationship to the "fortuitous" fact that they were actually made in a constitutionally protected area; (2) therefore, the issue of a constitutionally protected area was irrelevant; (3) since the risk that statements made to another will be

repeated is probably inherent in the conditions of human society, no constitutional issue remained. Brief for the United States, pp. 124-132, summarized in Comment, 76 Yale L.J. 994, 1009 n.3 (1967). The Court was persuaded by this argument. Thus, at 385 U.S. 301-302:

> The petitioner, in a word, was not relying on the security of a hotel room; he was relying on his misplaced confidence that Partin would not reveal his wrongdoing [footnote omitted]. As counsel for the petitioner himself points out, some of the communications with Partin did not take place in the suite at all, but in the 'hall of the hotel,' in the 'Andrew Jackson lobby' and 'at the courthouse.'

Similarly, in Lewis, the Government concluded its brief with the observation, adopted by the Court as a fair summary, that: "In short, this case involves the exercise of no Governmental

power to intrude upon protected premises; the visitor was invited and willingly admitted by the suspect. It concerns no design on the part of a government agent to observe or hear what was happening in the privacy of a home; the suspect chose the location where the transaction took place ...." 385 U.S. at 212.

Second, from the standpoint of the householder: In Hoffa, according to Partin, Hoffa attempted to enlist Partin's aid in the bribery scheme on the same day that Partin initially entered the suite. 385 U.S. at 296, n.3. In Lewis, the Court observed, at 385 U.S. 211, "But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled

to no greater sanctity than if it were carried on in a store, a garage, in a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant."

In the instant case, Miss Matthews' motive in admitting the police was perfectly innocent: she was merely doing a favor for a stranger.

The leading case upholding the use of artfulness and stratagem, Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932) and the cases it cites, all relate to government agents pretending to be willing accomplices or victims. While it may be legitimate to use deception which appeals to the criminal propensities of

a suspect, the justification is absent where the deception appeals to innocent motives.

Third, expectation of privacy: While the Court of Appeal in the instant case did not rely upon Metzger (according to the May, 1974 edition of Shepard's, no reported appellate decision anywhere has ever cited Metzger), the opinion begs the question, decided in Metzger, whether the use of deceit to obtain entry is lawful.

The Court of Appeal reasoned that since Miss Matthews admitted strangers who she thought were looking for another person who was also a stranger to her, she had no expectation of privacy. This, of course, simply does not follow. No one can say how much Miss Matthews valued her privacy. All that can reliably be said is that

she valued doing a favor for a stranger more than she valued her privacy, and that when the police confronted her with a situation where she was required to choose between these values, she chose to do the favor.

The police did not eschew deception in any form; they even tried to deceive Judge Karesh into believing that they really were looking for "Mike." The deception they practiced on Miss Matthews might be thought to be a mild form of deception. The fact remains that the police chose the deception in hopes that it would work. The reasoning of the Court of Appeal boils down to saying that if the deception works it is thereby, via the expectation of privacy route, justified.

(i) In the Court of Appeal of the State of California, First Appellate

District, Division Two. People of the State of California, Plaintiff and Respondent, v. Harold Willis and Christine F. Matthews, Defendants and Appellants. 1 Crim. No. 11356 (Sup. Ct. No. 81483), filed January 16, 1974.

"THE COURT:

"Appellants contend that the search warrant under which prosecution evidence was seized was based upon information obtained through an illegal entry.

"As noted in Hoffa v. United States (1966) 385 U.S. 293, 301, 'What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, . . .' Although it is true that the officers in this case used a type of 'deception' as

to their true motive in seeking admittance to the premises, it is clear from the record that appellant Matthews, in permitting entry, did not exhibit a reasonable expectation of privacy or reliance upon the security of the premises. The officers presented themselves to her as strangers, looking for someone whose description she did not even recognize. Each of the cases relied upon by appellants is distinguishable in that the occupants of the premises in those cases did not so obviously give up any reliance upon the security of their premises, but were persuaded to act by the particular identities and associations falsely presented.

"Judgments affirmed."

People v. Metzger, 22 Cal. App. 3d 338, 99 Cal. Rptr. 264. [Crim. No.

9852, First Dist., Div. One, Dec. 23, 1971.]

"ELKINGTON, J.--Defendant Michael Metzger was charged with narcotic and other offenses by a grand jury indictment. The evidence on which the indictment was based was seized in his home under authority of a search warrant. The superior court on a Penal Code section 1538.5 motion ordered the evidence suppressed. Concededly insufficient evidence to support a conviction remained; accordingly an order dismissing the action under Penal Code section 1385 was entered. The People appeal from the dismissal order, as permitted by Penal Code section 1238, subdivision (7).

"The evidence before the superior court on the Penal Code

section 1538.5 motion to suppress may be stated as follows.

"One Gerald McDonald had been a paid informer for the United States Customs Service. He was arrested in Marin County on charges relating to possession of stolen property. Thereafter he was used by the county police authorities 'to gain information' and was paid for his services. Among other things he told the police that he had seen marijuana, cocaine and hashish at Metzger's home. Metzger, he said, would go down stairs with keys and bring back small amounts of the narcotics 'and people there would partake of it.' The officers suggested to him that he telephone Metzger, who was an attorney at law, pose as a potential client and endeavor to

be invited into the lawyer's home where he might observe and later report the presence of narcotics. McDonald made the telephone call and after some conversation was invited to come to Metzger's office the following week. However, the following afternoon McDonald went to Metzger's home and knocked on the door. Metzger opened the door and said, 'Hi Jerry.' McDonald replied, 'What's doing, Mike,' whereupon Metzger said, 'Come on in.' 'During his conversation with the said Michael Metzger, he observed Metzger produce a handrolled cigarette and smoke the same. He recognized the cigarette from its odor and appearance to be a marijuana cigarette. The confidential reliable informant has used marijuana

himself in the past and has observed marijuana on numerous occasions and is well familiar with its appearance and its odor.' McDonald thereafter reported his observation to the officers; when he did, they smelled the odor of marijuana smoke on his clothing. He was in fact a 'reliable informer, having given the police truthful information in the past. He was paid $50 for the Metzger job; besides that he was promised nothing by the officers. The officers made no deal to dismiss the receiving stolen property charge against him; this charge was nevertheless later dismissed.

"Metzger contends that a Fourth Amendment violation resulted from the means used in securing entry into his home. No contention is

made of an invalid search or seizure or other constitutional breach after the entry, as condemned in Gouled v. United States, 255 U.S. 298 [65 L.Ed. 647, 41 S.Ct. 261]. After the entry McDonald observed only that which was in plain sight; such an observation is not a search. (People v. Roberts, 47 Cal. 2d 374, 379 [303 P.2d 721]; People v. Jackson, 14 Cal. App. 3d 57, 66-67 [92 Cal. Rptr. 91].)

"Police practices such as are here in question have been called 'dirty business' and are offensive to many people. Nevertheless they may not reasonably be considered as unrelated matters, but rather in the context of the unquestioned need to cope with growing criminal aggression in our state and nation. And because our decisions announce law

which is generally applicable, care should be taken that we be not swayed by persons, or kinds or levels of criminal activity, and thus create bad law.

"Although, as is well known, many police practices have been found constitutionally impermissible, there is nothing inherently unlawful in the use of police deceit for the purpose of suppressing crime and apprehending criminals. A rule, which so far as we know has never been questioned, was stated in 1932 by Chief Justice Hughes in Sorrells v. United States, 287 U.S. 435, 441-442 [77 L.Ed. 413, 416-417, 53 S.Ct. 210, 86 A.L.R. 249], as follows: 'Artifice and stratagem may be employed to catch those engaged in criminal enterprises. . . . The

appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. . . .'

"Yet when the police 'artifice' or 'stratagem' has the effect of invading guaranteed constitutional rights, it must be so held, and any evidence obtained as a result must be suppressed.

"The factual situation presented to us may reasonably be condensed to the following. Law enforcement authorities arranged for (1) a willing informer (2) who was person-

ally known to one suspected of engaging in criminal activity (3) to be invited into the home of that person (4) by means of deception as to his motive (5) for the purpose of observing such criminal activity and reporting it to the authorities, (6) which information, but for the questioned entry, was not unconstitutionally obtained.

"Our task is to determine which side of the line between permissible, and constitutionally proscribed, police activity the facts of this case fall. That line is not easily found; it has been the subject of conflicting decisions and discussion, and many reasonable men have disagreed.

"In our inquiry the controlling authority on the constitutional

issue involved is, of course, the United States Supreme Court (Chesapeake & Ohio Ry. v. Martin, 283 U.S. 209 [75 L.Ed. 983, 51 S.Ct. 453]; Perkins Mfg. Co. v. Jordan, 200 Cal. 667, 678–679 [254 P. 551]); and as to that court, its later decisions must be deemed to have superseded any earlier contrary authority. (Asher v. Texas, 128 U.S. 129, 131 [32 L.Ed. 368, 369, 9 S.Ct. 1]; Estate of Keig, 59 Cal. App. 2d 812, 816-817 [140 P.2d 163]; People v. Bateman, 57 Cal. App. 2d 585, 587 [135 P.2d 192].)

"United States v. White (1971) 401 U.S. 745 [28 L.Ed.2d 453, 91 S. Ct. 1122], appears to be the most recent relevant authority. In that case a willing informer who was known to White, concealing his pur-

pose and police connections, by invitation entered the home of White, whom he engaged in incriminating conversations which were transmitted to outside police by means of a concealed electronic device. No Fourth Amendment intrusion was found. Citing Lewis v. United States, 385 U.S. 206 [17 L.Ed.2d 312, 87 S.Ct. 424], the court said (p. 749 [28 L.Ed.2d at p. 457]), 'No warrant to "search and seize" is required in such circumstances, nor is it when the Government sends to defendant's home a secret agent who conceals his identity and makes a purchase of narcotics . . . .' In such a situation, it was stated, where one trusts an apparent colleague '. . . "no interest legitimately protected by the Fourth Amendment is involved,"

for that amendment affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." Hoffa v. United States [385 U.S.] at 302, . . .'

"We are unable to observe any substantial distinguishable factual difference between United States v. White and the case before us. There also (1) a willing informer (2) personally known to White (3) was invited into White's home (4) by means of deception as to his motive (5) for the purpose of reporting criminal activity to government agents, (6) and but for the questioned entry no constitutional violation occurred.

"Hoffa v. United States (1966) 385 U.S. 293 [17 L.Ed.2d 374, 87 S.

Ct. 408], was relied upon by the court in United States v. White. One Partin, a union official and a government informer, was personally known to Hoffa. 'Deceptively' (as to his purpose and government connections) Partin and government agents arranged for him to be in Hoffa's 'hotel suite by invitation' [footnote omitted] over an extended period of time for the purpose of observing and reporting any criminal activity of Hoffa. In the hotel suite Partin observed criminal activity of Hoffa which he reported to the agents. It was urged that the admission at Hoffa's later trial of evidence of Partin's observations was, because of the 'deceptive' means used to gain entry to Hoffa's suite and presence, violative of the

Fourth Amendment. Here again although the factual context also closely parallels that of the case at bench, no Fourth Amendment violation was found.

"The court pointed out that (p. 302 [17 L.Ed.2d at p. 362]): 'Partin was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence. The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing. . . .' It was then stated: 'Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to

whom he voluntarily confides his wrongdoing will not reveal it. . . .'

"On Lee v. United States (1951) 343 U.S. 747 [96 L.Ed. 1270, 72 S.Ct. 967]: On Lee, a laundryman, had his living quarters in the rear of the laundry. Suspicious of his dealings, the government employed On Lee's 'old acquaintance and former employee,' Chin Poy, as a 'stool pigeon.' Chin Poy on several occasions 'sauntered in and, while customers came and went,' engaged On Lee in incriminating conversations which were transmitted by radio to outside agents. The court said (pp. 751-752 [96 L.Ed. at p. 1274]) that the conduct of the government and Chin Poy 'did not amount to an unlawful search and seizure such as is proscribed by the Fourth Amend-

ment. . . . Chin Poy entered a place of business with the consent, if not by the implied invitation" of On Lee.

"From the foregoing high authority, which is wholly binding upon us, it becomes clear that no Fourth Amendment taint attended the means by which, in the case before us, McDonald gained entry into defendant Metzger's home.

"Support for Metzger's contention is claimed in the earlier case of Gouled v. United States, supra, 255 U.S. 298. But there the factual context is completely dissimilar from those of the foregoing authorities and of the case at bench. A business acquaintance of Gouled, acting under orders of federal officers, gained entry into

Gouled's office by falsely pretending to pay a social visit. The intruder then secretly ransacked the office finding incriminating documents. It was this latter conduct, clearly a constitutionally banned governmental search and seizure, that the court found objectionable. (And see discussion of Gouled in Lewis v. United States, supra, 385 U.S. 206, 209-210 [17 L.Ed.2d 312, 315].) Here the informer McDonald entered upon no search or seizure within the home; he did no more than observe Metzger engage in criminal activity.

"We now consider other authority relied upon by Metzger.

"People v. Reeves, 61 Cal.2d 268 [38 Cal. Rptr. 1, 391 P.2d 393], in no way contradicts the holdings

of White, Hoffa and On Lee. In Reeves a hotel manager was induced by police to advise a room tenant falsely that an expected registered letter had arrived downstairs. As the tenant's door was opened police waiting outside observed narcotics inside. In no sense could the police be considered invitees of the hotel guest. No trust was reposed in an apparent friend or colleague, nor was there a 'wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.' (See United States v. White, supra, 401 U.S. 745.)

"The reliance on People v. Mesaris, 14 Cal. App. 3d 71 [91 Cal. Rptr. 837], In re Robert T., 8 Cal. App. 3d 990 [88 Cal. Rptr. 37], People v. Miller, 248 Cal. App. 2d

731 [56 Cal. Rptr. 865], People v. Porter, 227 Cal. App. 2d 211 [38 Cal. Rptr. 621], Fraternal Order of Eagles, No. 778 v. United States, 57 F.2d 93, United States v. Reckis, 119 F.Supp. 687, United States v. Guerrina, 112 F.Supp. 126, United States v. Mitchneck, 2 F.Supp. 225, is also misplaced. In none of these cases was there the 'misplaced belief that a person to whom [one] voluntarily confides his wrongdoing will not reveal it.' In Mesaris, plainclothes police gained entrance by pretending a need to talk to a repairman in the house. Robert T.'s plainclothes policeman named 'Melvin' was introduced as '"My friend Joe"' by the landlord; he walked into the apartment with the landlord pretending a check to see if the tenant had 'sublet'. In

Miller, police went to his room with the landlord who knocked and said, '"You have a caller."' Police saw narcotics when the door was slightly opened. In Porter, police and federal agents rang a door bell and then answered '"Yes"' to the question '"Is that you, Bill?"' In Fraternal Order of Eagles, prohibition agents falsely gained entrance by posing as brother Eagles. In Reckis a federal agent gained entry by saying, 'The boss sent me down to fix the still.' Guerrina concerned an invited civil tax agent who surreptitiously brought in a criminal agent for a criminal investigation. And in Mitchneck, prohibition agents gained entry by falsely posing as refrigerator salesmen having mutual acquaintances

with Mitchneck.

"Metzger's secondary contention in the superior court Penal Code section 1538.5 proceedings was that the affidavit purporting to support the subject search warrant was insufficient as a matter of law.

"As relevant, the affidavit dated December 6, 1970, of a police officer, alleged receipt of information from a person, previous information from whom had been correct and reliable and had twice resulted in arrests. The informer related to the officer: that on two occasions in June and July 1970 he had 'observed small quantities of hashish, marijuana and cocaine being used by the occupants of [Metzger's] residence, all of which had been produced by the said Michael Metzger'; that

on or about December 6, 1970, he was in the residence of Metzger for about one-half hour during which time he observed Metzger produce a hand-rolled cigarette and smoke the same; that he recognized the cigarette from its odor and appearance to be a marijuana cigarette; and that he 'has used marijuana . . . on numerous occasions and is well familiar with its appearance and its odor.' The police officer affiant himself alleged that when the informer exited [from] the residence he [the officer] could detect upon [the informer's] person and clothing the odor of burned marijuana which was not present when he entered the residence.'

"Metzger's argument is that from the allegations that he 'pro-

duced' the described narcotics in his home it could not reasonably be inferred that additional narcotics were to be found therein. The superior court found against Metzger on this issue, concluding that the affidavit 'probably is sufficient.' We find ourselves in agreement with the superior court.

"In making this determination we are bound by certain rules recently reiterated in Skelton v. Superior Court, 1 Cal. 3d 144, 150 [81 Cal. Rptr. 613, 460 P.2d 485] as follows: '[W]hen a search is based on a warrant (and therefore on a magistrate's rather than a police officer's determination of probable cause) the reviewing courts "will accept evidence of a less 'judicially competent or persuasive character than would have

justified an officer in acting on his own without a warrant.' . . ." In determining the sufficiency of an affidavit for the issuance of a search warrant the test of probable cause is approximately the same as that applicable to an arrest without a warrant, a commitment by a magistrate or an indictment by a grand jury . . . , namely, whether the facts contained in the affidavit are such as would lead a man of ordinary caution or prudence to believe, and conscientiously to entertain, a strong suspicion of the guilt of the accused. . . . The rules of appellate review recognize the impracticality of establishing a precise calculus by which the existence of probable cause is to be determined: the warrant can be

upset only if the affidavit fails as a matter of law to set forth sufficient competent evidence supportive of the magistrate's finding of probable cause, since it is the function of the trier of fact, not the reviewing court, to appraise and weigh evidence when presented by affidavit as well as when presented by oral testimony.'

"Here a reliable police agent, six months before in Metzger's home, had seen Metzger produce three kinds of narcotics which were then used by the building's occupants. On the day of the affidavit he had again seen Metzger produce and use a narcotic in his home. We cannot say, as a matter of law, that the magistrate as an ordinarily prudent and cautious man could not 'believe,

and conscientiously . . . entertain, a strong suspicion' that narcotics were being kept by Metzger in his home. It is true as argued by Metzger that the narcotics could have been produced from his person, and not otherwise from within his home. But the magistrate could reasonably have inferred that Metzger, a lawyer, did not customarily carry narcotics on his person.

"The order of dismissal is reversed.

"Molinari, P.J., and Sims, J., concurred.

"Respondent's petition for a hearing by the Supreme Court was denied March 8, 1972. Peters, J., and Tobriner, J., were of the opinion that the petition should be granted."

(j) Petitioner Matthews was placed on probation for 3 years with a condition that she serve 6 months in the county jail. The jail term has been served. Petitioner Willis was sentenced to state prison. He is presently enlarged upon bail pending appeal.

"Superior Court of the State of California for the City and County of San Francisco.

"The People of the State of California vs. Harold Willis, Defendant.

"No. 81483.

"Nature of Proceedings: Sentence to State Prison

"Defendant is present with counsel, G. Glass

"This cause comes on regularly this day for: Sentence

"The defendant having been convicted of the crime of felony, to-wit: Vio.

Sec. 11530.5 H&S

"The Court orders that probation is denied.

"It is therefore ordered, adjudged and decreed that the said defendant be punished by imprisonment in the State Prison of the State of California for the term provided by law.

"Defendant remanded to the custody of the Sheriff to be delivered into the custody of the Director of Corrections at Vacaville, California.

"The Court grants the Defendant's Motion to set bail pending appeal. The Court sets bail at $2500 and orders bail originally posted be transferred to bail set this date, pending appeal.

"Dept. 24, Date 9/5/72, Pg. 113.

"Attest (signed) Marie Fakoury, Deputy Clerk."

"Superior Court of the State of

California for the City and County of San Francisco.

"The People of the State of California vs. Christine F. Matthews, Defendant.

"No. 81483.

"Nature of Proceedings: Sentence to State Prison, suspended.

"Defendant is present with counsel, G. Glass

"The defendant having been convicted of the crime of felony, to-wit: Vio.Sec. 11530.5 H&S

"It is therefore ordered, adjudged and decreed that the said defendant be punished by imprisonment in the State Prison of the State of California for the term provided by law

"The Court orders that execution of the sentence herein imposed is suspended and that the defendant is placed

on probation for a period of 3 years, subject to the following terms and conditions, to-wit: Defendant shall be confined in the County Jail for the term of 6 months.

"Defendant remanded to the custody of the Sheriff.

"The Court orders bail exonerated.

"Dept. 24, Date 9/5/72, Pg. 114.

"Attest (signed) Marie Fakoury, Deputy Clerk."

For the foregoing reasons, it is respectfully submitted that a petition for certiorari herein should be granted.

Dated: _____

ROMMEL BONDOC,

Attorney for Petitioners

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1812

HAROLD WILLIS and CHRISTINE MATTHEWS,
Petitioners,

vs.

THE STATE OF CALIFORNIA, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of January 16, 1974, of the Court of Appeal of the State of California, First Appellate District, Division Two, is unreported. The substance of this opinion is reproduced under subdivision (i) of the petition for writ of certiorari on file herein, pages 25-27. Petitioners' application for hearing in the California Supreme Court was denied on March 13, 1974. A copy of the clerk's notice reflecting this denial is attached hereto and served and filed herewith as Exhibit A.

JURISDICTION

Petitioners invoke the jurisdiction of this Court to review the judgments below by writ of certiorari under Title 28, United States Code section 1257(3).

QUESTIONS PRESENTED

1. Whether the police conduct in gaining entry into the premises in question involved some form of active deception.

2. Whether such police conduct invalidated Miss Matthews' consent to enter by proximately causing her to compromise any exhibited reasonable expectation of privacy in those premises.

STATEMENT OF THE CASE

On August 25, 1971, an information was filed in the San Francisco Superior Court, charging Harold Willis and Christine F. Matthews, petitioners herein, with violation of California Health and Safety Code sections 11500.5 (now 11351) (possession for sale of a narcotic other than marijuana), 11911 (now 11378) (possession for sale of restricted dangerous drugs), and 11530.5 (now 11359) (possession of marijuana for sale) (Clerk's Transcript [hereinafter CT] 1). On September 3, 1971, each defendant pled not guilty to all counts of the information (CT 3).

On November 12, 1971, the defendants moved, pursuant to California Penal Code section 1538.5, that

all contraband seized in the case be suppressed as evidence (CT 4, 5, 7), on the ground that the search warrant (CT 20) was invalid as "based on a prior illegal search made by a deceptive and illegal entry into defendants' abode" (CT 9). This motion was denied on January 7, 1972 (CT 57; Augmentation to Reporter's Transcript [hereinafter RTA] 1-3): the court found that a deception was practiced by Officer Wolfe—he having no reason to believe that "Mike" was inside the premises at the time of his initial entry on July 1, 1971—but determined that such a deception may be used (RTA 2-3).

The case came on for jury trial on August 8, 1972, at which time the defendants withdrew their pleas of not guilty, and pled guilty to violation of California Health and Safety Code section 11530.5 (now 11359) (possession of marijuana for sale). The other two charges were thereupon dismissed on motion of the district attorney (CT 59).

On September 5, 1972, Mr. Willis was sentenced to State prison for the term provided by law (2-10 years) and admitted to bail pending appeal (CT 60). On the same date, Miss Matthews was sentenced to State prison for the term provided by law (2-10 years), execution thereof was suspended, and she was placed on probation for three years, subject to the condition that she serve six months in the county jail (CT 61).

Petitioners filed notice of appeal on September 5, 1972 (CT 65), and on January 16, 1974, their judgments were affirmed on appeal (*see* pages 25-27 of

the petition on file herein). On March 13, 1974, their petition for a hearing in the California Supreme Court was denied (*see* Exhibit A attached hereto), and their petition for a writ of certiorari was then filed in this Court on June 1, 1974.

STATEMENT OF FACTS

On Thursday, July 1, 1971, at approximately 10:00 p.m., San Francisco Police undercover Officers Fred Kennerley and Patrick Wolfe went to 558 Steiner Street, San Francisco (Preliminary Hearing Transcript [hereinafter PHT] 5, 11, 12). Officer Wolfe rang the bell (PHT 11), and Christine Matthews answered the door (PHT 6, 19). They explained that they were looking for a certain individual, "Mike" (PHT 6, 20).

Officer Wolfe had gone to that address with "Mike" on two previous occasions to be introduced to individuals within those premises to make purchases of narcotics, but was unsuccessful in this regard (Reporter's Transcript [hereinafter RT] 12-13). He was there on the night in question to further this narcotics investigation (RT 16), hoping "Mike" would be there (RT 13).

He told Miss Matthews that he was looking for a Mike Bardeleban (mentioning the last name: RT 17) and asked her if he was there, giving her a description of Mike (RT 14, 18). He then thought the de-

scription was accurate (RT 22, 27), but acknowledged on the stand that he was mistaken about Mike having a beard (RT 18, 23).

Miss Matthews said that from the description, she did not know the particular person they were talking about, and she could not say that that person was there. But she also said that there were several people upstairs playing poker (PHT 6, 12), and that the two officers could see if Mike was there (RT 14, 18).

The conversation between Miss Matthews and Officer Wolfe was, according to Officer Kennerley, something to the following effect:

> Officer Wolfe: "Hey, what's happening? Is Mike upstairs?"
>
> Miss Matthews: "Mike who?"
>
> Officer Wolfe: "You know, Mike, he is the tall guy with the beard and long hair."
>
> Miss Matthews: "Gee, I don't know if he is, there are a lot of people playing cards upstairs, come in and look." (PHT 20.)

Miss Matthews thereupon admitted the officers, saying "Come on in" or words to that effect (PHT 13). They all went upstairs to the back of the building to what appeared to be the kitchen, where some people were playing cards. A quantity of vegetable material was visible on the table, and a strong aroma of marijuana was discernible (PHT 6, 12). The officers also saw contraband through an open door at the other end of the hallway (PHT 8-9). They then told Miss Matthews that the person they were trying to locate was not on the premises, and left (PHT 10, 39).

They returned about two minutes later with three other officers: Sully, Yeargain, and Molinari (PHT 39-40). Officer Sully told Miss Matthews at the door that he was a police officer on a narcotics investigation and that they had been advised that there was marijuana and LSD on the premises. He asked if she minded if they went upstairs, she did not say anything in response, and they all went upstairs (PHT 42, 52-53). All the people in the kitchen were placed under arrest, advised of their rights, and told that Officer Sully was going to attempt to obtain a search warrant (PHT 43, 58). He did so later that evening, served it on Miss Matthews, and then conducted a search of the premises (PHT 44; RT 74-75). This search resulted in seizure of the contraband which was the subject of the motion to suppress in the Superior Court (PHT 81-85).

On November 12, 1971, at the hearing of the defense motion to suppress evidence, the district attorney conceded that if the original entry into the premises was unlawful, the search warrant and search and seizure pursuant thereto were also invalid (RT 3:16-4:11, 7:17-20).

SUMMARY OF ARGUMENT

I. The police conduct in gaining entry into the premises in question did not involve any form of active deception.

II. Such police conduct did not invalidate Miss Matthews' consent to enter because it did not proxi-

mately cause her to compromise any exhibited reasonable expectation of privacy in those premises.

ARGUMENT

I

THE POLICE CONDUCT IN GAINING ENTRY INTO THE PREMISES IN QUESTION DID NOT INVOLVE ANY FORM OF ACTIVE DECEPTION.

Petitioners cite six California cases for the proposition that consent to enter and the use of any evidence obtained thereby are invalid under the Fourth Amendment, where the consent was obtained by deception.[1] However, those cases are completely distinguishable.

In *People v. Reeves,* 61 Cal.2d 268, 38 Cal.Rptr. 1 (1964), the hotel manager's call to the defendant made the defendant believe something that was not true: that there was a letter for him at the desk. In *People v. Mesaris,* 14 Cal.App.3d 71, 91 Cal.Rptr. 837 (1970), the plainclothesmen's asking for the refrigerator repairman under the circumstances misled the defendant into believing that they were there for a business purpose: either to aid or talk to the repairman as co-repairmen. In the case of *In re Robert T.,* 8 Cal.App. 3d 990, 88 Cal.Rptr. 37 (1970), the apartment owner's

---

[1]Federal cases are to the same effect: *Gouled v. United States,* 255 U.S. 298, 305-306, 41 S.Ct. 261, 65 L.Ed. 647 (1921); *Fraternal Order of Eagles, No. 778 v. United States,* 57 F.2d 93 (3rd Cir. 1932); *United States v. Reckis,* 119 F.Supp. 687 (D. Mass. 1954); *United States v. Guerrina,* 112 F.Supp. 126 (E.D. Pa. 1953); *United States v. Mitchneck,* 2 F.Supp. 225 (M.D. Pa. 1933).

introduction of the policeman as a friend misled the defendant into believing that they were merely checking the condition of the apartment.

In *People v. Miller,* 248 Cal.App.2d 731, 56 Cal. Rptr. 865 (1967), the apartment manager's statement misled the defendant into believing that he had a caller for whom he would have immediately opened the door. In *People v. Porter,* 227 Cal.App.2d 211, 38 Cal.Rptr. 621 (1964), the sergeant's affirmative answer to the defendant's question made the defendant believe something that was not true: that his roommate, Bill, was at the door. In *People v. Hodson,* 225 Cal.App.2d 554, 37 Cal.Rptr. 575 (1964), the policeman's statement through the door misled the defendant into believing that the speaker was the manager.

In sum, as the Court said in *Mann v. Superior Court,* 3 Cal.3d 1, 9, 88 Cal.Rptr. 380, 384, 472 P.2d 468, 472 (1970):

> "Cases holding invalid consent to entry obtained by ruse or trick all involve some positive act of misrepresentation on the part of the officers, such as claiming to be friends, delivery men, managers, or otherwise misrepresenting or concealing their identity. [Citations.] Here there was no such form of active deception."

If "to deceive" can fairly be defined as "to make a person believe what is not true" (*see* Webster's New World Dictionary, Concise Edition, 1962, page 196), it is clear that, contrary to the conclusion of the Superior Court (RTA 2-4, 6), a deception was not prac-

ticed in this case to gain the initial entry into the premises on July 1, 1971.

The court based its conclusion on its finding that Officer Wolfe had no reason to believe Mike was inside the premises at that time. But that does not necessarily mean a deception was practiced. The court asked, "Why isn't it a deception if you don't have reason to believe he is in there?" (RTA 4:21-22). The answer lies in the distinction pointed out by the district attorney (CT 30): while Officer Wolfe's asking for Mike may not have been based upon any belief that Mike was *in fact* there at that time, it was based upon his belief, from his observations of Mike going in and out of the premises on two previous occasions in April 1971 (RT 12-13, 19, 28), that Mike *might* be there.

Officer Wolfe was simply *hoping* Mike would be there, in all probability so as to again enlist his aid in another attempt to make a narcotics purchase from individuals within those premises. He merely asked *if* Mike was there. He did not say or imply that he personally knew Mike, that he thought Mike was there then, that he or Mike had ever been inside the premises, or that he or Mike knew anyone there. Most importantly, he did not ask to be admitted to look for Mike. Rather, Miss Matthews on her own initiative invited the two officers inside to look for Mike themselves.

Miss Matthews *may* have believed Officer Wolfe had reason to think Mike was in the premises (a point on which no evidence was introduced), but such

a belief could not reasonably be said to have been induced by Officer Wolfe; she would have simply jumped to the wrong conclusion. What Officer Wolfe can reasonably be said to have made Miss Matthews believe was that he was looking for Mike, hoping to find him there. There is no evidence or finding that her belief in this regard was erroneous.

The Superior Court's conclusion attempted to resolve an issue of law, *i.e.*, what constitutes a deception to gain entry, subject as such to ultimate determination by this reviewing court. In a proceeding to suppress evidence under California Penal Code section 1538.5, the trial court, in addition to its fact finding function, has a duty to decide whether, on the facts found, a challenged search was unreasonable within the meaning of the Constitution. The responsibility of a reviewing court in such a case is to measure the facts, as found by the trier, against the constitutional standard of reasonableness. *People v. Manning*, 33 Cal.App.3d 586, 589, 109 Cal.Rptr. 531, 540 (1973). The measurement depends, in part, on the general rule that a ruling of a trial court upon a motion implies a finding of fact favorable to the prevailing party on each ground or theory underlying the motion. *People v. Manning, supra* at 601-602, 109 Cal. Rptr. at 542.

Hence, while the Superior Court expressly found that Officer Wolfe had no reason to believe Mike was present on the premises at the time, it should also be treated by this Court as having impliedly found that Officer Wolfe reasonably caused Miss Matthews to

believe no more than what was true, that he was *hoping* Mike was there. When this latter fact is measured against the constitutional standard of reasonableness, the result becomes manifest: no deception as defined above was practiced to gain the entry in question.

The same can be said of the entry in *People v. Metzger*, 22 Cal.App.3d 338, 340-341, 99 Cal.Rptr. 264, 265 (1971). McDonald, the police agent therein, simply asked, after knocking at the door of the defendant's home, "What's doing, Mike," whereupon the defendant said, "Come on in." His false representation as a potential client of the defendant in no way related to the entry, having occurred the day before and resulting in an appointment at the defendant's office the following week. And he had previously been in the defendant's home on apparently purely social occasions. There was thus no indication that McDonald had, in the defendant's mind, arrived for the contemplated business call.

As here, the only "deception" in the *Metzger* case concerned the undercover agent's *motive, i.e.,* his purpose and government connections. *Id.* at 342, 343, 99 Cal.Rptr. at 266. Such artifice is permissible. *See United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971); *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed. 2d 312 (1966); *On Lee v. United States*, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1951); *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932);

People v. Metzger, supra at 341-344, 99 Cal.Rptr. at 265-267.

II

SUCH POLICE CONDUCT DID NOT INVALIDATE MISS MATTHEWS' CONSENT TO ENTER BECAUSE IT DID NOT PROXIMATELY CAUSE HER TO COMPROMISE ANY EXHIBITED REASONABLE EXPECTATION OF PRIVACY IN THOSE PREMISES.

As this Court held in *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967),

> "[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

In other words, the Fourth Amendment protects actual (subjective) expectations of privacy that society is prepared to recognize as reasonable. *Id.* at 361 (Mr. Justice Harlan, concurring). The test, then, in determining the constitutionality of a consensual entry by the police, is whether the person giving consent exhibited a reasonable expectation of privacy in the premises, and if so, whether that expectation was "violated by unreasonable government intrusion" because police deception proximately caused that person to compromise the expectation. *See North v. Superior Court,* 8 Cal.3d 301, 308, 104 Cal.Rptr. 833, 837, 502 P.2d 1305, 1309 (1972); *People v. Bradley,* 1 Cal.3d 80, 84, 85, 81 Cal.Rptr. 457, 459, 460 P.2d

129, 131 (1969); *People v. Edwards,* 71 Cal.2d 1096, 1103-1104, 80 Cal.Rptr. 633, 637-638, 458 P.2d 713, 717-718 (1969).

Given the lack of police deception as discussed in Argument I above, the entry here was not constitutionally invalid. Even assuming *arguendo* the Superior Court correctly concluded that a deception was practiced to gain entry into the premises, the entry was lawful. For Miss Matthews *exhibited* no expectation of privacy whatsoever when the two officers, strangers to her, asked if "Mike," yet another stranger to her, was there. On the contrary, by inviting them on her own initiative to come in and look for Mike themselves—instead of asking them to remain outside or at the bottom of the stairs while she went up to see herself if Mike was present—she was demonstrating that she was not at all concerned about privacy (CT 31-32). Indeed, the Superior Court specifically made such a determination (RTA 3:19-20).

Moreover, the two officers cannot be deemed to have reasonably induced, *i.e.,* proximately caused, Miss Matthews to permit their entry in violation of any supposed reliance by her on the privacy of the premises. Neither officer said or implied that he personally knew Mike, that he believed Mike was there then, that he or Mike had ever been inside the premises, or that he or Mike knew anyone there. And, most importantly, they did not ask to come in to look for Mike. Using no trickery to get the door open in the first place, they then simply asked as two total strangers if another stranger was there.

Miss Matthews merely misplaced her confidence in the officers not to disclose observations of narcotics which she knew they might very well make while inside (CT 31-32). The evidence was uncontradicted that narcotics were in plain view.[2] It is reasonably inferable, therefore, that she knew narcotics were present and could readily be observed by anyone permitted inside the premises. As the court indicated in *Hoffa v. United States, supra* at 301-302, the Fourth Amendment does not protect a wrongdoer who does not rely upon the security of the premises, but upon his misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. What one knowingly exposes to open view, even in his own home, is not a subject of Fourth Amendment protection. *Katz v. United States, supra* at 351.

Similarly, in *People v. Metzger, supra,* the defendant exhibited no expectation of privacy in his premises at the time of the informer's entry. He merely said, "Come on in" upon McDonald's query at the door, "What's doing, Mike." Rather, by subsequently producing and smoking the marijuana cigarette, Metzger was mistakenly trusting the informer not to disclose such wrongdoing.

Returning to the cases discussed in Argument I above, they are additionally distinguishable because they involved deceptive practices of the sort that

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[2]Objects in plain view of a police officer from a vantage point where he has a right to be are not discovered as products of a search. *See Ker v. California,* 374 U.S. 23, 43, 88 S.Ct. 1623, 10 L.Ed.2d 726 (plurality opinion) (1963); *Guidi v. Superior Court,* 10 Cal.3d 1, 6 n. 3, 109 Cal.Rptr. 684, 687, 513 P.2d 908, 911 (1973).

would and did reasonably induce persons, regardless of their innocence or guilt, to relinquish exhibited expectations of privacy in their respective premises.

In *People v. Reeves, supra,* trickery was used to get the defendant to open his door in the first place, not to thereafter enter the premises. The breach of privacy thus occurred upon the very opening of the previously closed door. The same can be said for the cases of *People v. Miller, People v. Porter,* and *People v. Hodson, supra.*

In *People v. Mesaris, supra,* the plainclothes policemen asked to see the refrigerator repairman. The implication was that they wanted to see him *inside* the premises, since he was working on the refrigerator. One of the defendants told them he was in the kitchen, and she pointed in its direction. She thereby demonstrated her expectation of privacy by allowing entry only into the kitchen, without any indication that she knew marijuana was hidden in the motor of the refrigerator.

In the case of *In re Robert T., supra,* the manager and policeman asked to be allowed to come in the apartment on the pretext of checking its physical condition. The defendant demonstrated his expectation of privacy by then pushing the door to a nearly closed position and saying, "Just a moment," admitting them only thereafter (8 Cal.App.3d at 993, 88 Cal. Rptr. at 38).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari in this case should be denied.

Dated, August 20, 1974.

EVELLE J. YOUNGER,
Attorney General of the State of California,
JACK R. WINKLER,
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Deputy Attorney General,
Attorneys for Respondent.

(Exhibit A Follows)

Exhibit A

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Mar. 13, 1974

I have this day filed Order
HEARING DENIED

In re: 1 Crim. No. 11356

People
vs.
Willis, et al.

Respectfully,
G. E. Bishel
Clerk

SUPREME COURT, U. S.

IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1973

NO. 73-1812

HAROLD WILLIS and CHRISTINE MATTHEWS,

Petitioners,

vs.

THE STATE OF CALIFORNIA, Respondent.

PETITIONERS' REPLY BRIEF

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IN THE SUPREME COURT

of the

UNITED STATES

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I

Respondent argues, at pages 7 through 12 of the Brief in Opposition to the Petition, that the police did not use active misrepresentation to obtain the entry in the instant case or in Metzger.

The Court of Appeal in each case proceeded on the basis that active misrepresentation was involved. Thus, in Metzger, the court states that the police suggested to the informant that he pose as a potential client (Petition herein, pages 29 through 30). In the instant case, the court acknowledges that "... the officers...used a type of 'deception'...." (Petition herein, pages 26 and 27).

This approach by the Court of Appeal is in accord with the California rule that a supported factual finding in favor of the party who loses a motion is binding on appeal. Please see generally,

People v. Manning, 33 C.A.3d 586, 602-604 (1973).

Respondent seeks to quarrel with the finding of the trial court by pointing to the distinction between expecting Mike to be present and hoping that he would be. While there is a theoretical distinction, the court clearly found that it did not obtain in this case. Rather, the court drew the natural inference that because the police had no reason to think that Mike would be there, they were not really looking for him, particularly in view of the earlier leather belt ruse, the presence of other police waiting nearby, the discrepancies in the description of Mike, and the whole history of the investigation. Obviously, if the trial court had believed that the officers genuinely hoped to find Mike, the term "deception" would be inappropriate.

To avoid this, Respondent suggests that the trial court does not understand what deception is. There is nothing arcane in Respondent's explication of deception, and the suggestion that Respondent knows what deception is, but the trial court does not, is most presumptuous.

II

Respondent also argues that the deception was not the "proximate cause" of the entry. The entry was the intended object of the deception. Where wrongful conduct achieves its intended purpose, there is no room for the doctrine of proximate cause. Please see Restatement of Torts, Section 870 (1939).

Similarly, Respondent's suggestion at page 13 of the Brief in Opposition, that Miss Matthews could have avoided the invasion by checking herself if Mike were there (two round trips up the stairs in

all), puts the shoe on the wrong foot. Respondent cannot justify the deception on the basis that it worked.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be granted.

Dated: August 26, 1974.

Respectfully submitted,

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